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Via Facsimile and First Class Mail

Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attention: Jeff S. Jordan

Re: MUR 5440—Stephen L. Bing

Dear Mr. Jordan:

This will respond on behalf of our client, respondent Stephen L. Bing, to the Complaint filed by the Republican National Committee in the above-captioned MUR. A Statement of Designation of Counsel has been previously sent to you by Mr. Bing.

The Commission should find no reason to believe that Mr. Bing has violated the Act or the Commission's regulations, and should dismiss the Complaint as to Mr. Bing, for two reasons.

First, contributions that were made by Mr. Bing to the organizations that are referred to in the RNC Complaint were entirely lawful. It is our understanding that activities undertaken by these organizations were also well within the law.

Second, other than the fact that Mr. Bing made lawful contributions, there is no allegation that Mr. Bing engaged in any unlawful conduct anywhere in the Complaint. Thus, the inclusion of Mr. Bing in the Complaint is solely as a result of the fact that non-federal contributions were made which Mr. Bing believed, and still believes, were lawful.

I. Neither the Media Fund nor the MoveOn.org Voter Fund are Federal "Political Committees"

Although Mr. Bing is not familiar with the details of the full operations of the organizations that he contributed to, it is clear that Mr. Bing intended to contribute non-federal funds to three "527" organizations. Furthermore, Mr. Bing understood that these organizations, MoveOn.org Voter Fund, The Media Fund and Americans Coming Together-Non-Federal Account (the latter two were received contributions through the Joint Victory Campaign 2004, a joint fundraising project).

Based upon a review of the Complaint and current law regarding 527 organizations, it is clear that the RNC Complaint is without merit and Mr. Bing's contributions were entirely lawful.

The Commission has, of course, instituted a rulemaking to determine whether the *existing* rules for determining what constitutes a "political committee" should be modified. Notice of Proposed Rulemaking, 69 *Fed. Reg.* 11736 (March 11, 2004). **Unless and until the Commission changes its regulations, however, it is clear that The Media Fund is not a federal "political committee."** At its meeting on May 13, 2004, the Commission rejected, by a 4-2 vote, a proposal by two Commissioners that sought to convert issue advocacy organizations, such as the organizations mentioned above, into "political committees."

First, contrary to the Complaint's suggestion, the purpose and motivation of a communication are irrelevant, as they must be, unless the government is to begin peering into peoples' minds to determine the lawfulness of their political speech. Further, it is not, and has never been, the law that "communications referring to a clearly identified federal candidate are for the purpose of influencing a federal election."

Rather, an organization is a federal political committee only if it spends more than $1,000 in a year "for the purpose of influencing a federal election." 2 U.S.C. §431(9)(A). For more than 25 years, it has ben the law that this definition of "expenditure" is confined to communications that "in express terms advocate the election or defeat of a clearly identified federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976).

Nothing in the Bipartisan Campaign Reform Act of 2002 (BCRA) changes that test. To the contrary, the U.S. Supreme Court, in its recent decision upholding most of BCRA, *McConnell v. Commission*, 540 U.S. __, 124 S. Ct. 619, 687-88 (2003), explicitly affirmed the *Buckley* test. The *McConnell* Court further characterized its earlier opinion in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248 (1986) reaffirming this construction of "expenditure". The *McConnell* Court indeed confirmed that, "Since our decision in Buckley, Congress' power to prohibit corporations

and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law." 124 S.Ct. at 694.

There is no question that advertisements by The Media Fund and MoveOn.org Voter Fund do not meet the "express advocacy" test and the Complaint does not suggest otherwise. For that reason, based on the facts alleged in the Complaint, neither the Media Fund nor MoveOn.org Voter Fund is not a federal "political committee" within the meaning of the Act and the Commission's regulations.

Second, with respect to the Media Fund and MoveOn.org the Commission Advisory Opinion referred to by the Republican National Committee—Commission Advisory Opinion 2003-27—applies by its terms only to federal political committees that are *already* registered as such with the Commission. Because neither the Media Fund nor MoveOn.org Voter Fund insofar as the Complaint reveals, has spent anything on communications expressly advocating the election or defeat of any candidate, clearly neither is a federal political committee under current law. Therefore neither organization is required to use, for its advertising, contributions subject to the limitations and prohibitions of the Act.

Third, contrary to the assertion in the Complaint (p. 9), neither the Supreme Court nor the Commission have *ever* ruled that any organization that runs any advertisement that "promotes, supports, attacks or opposes a clearly identified Federal candidate" must be paid for from regulated funds. That phrase is used in the Act, as amended by the BCRA, solely with respect to regulating the activities of *political party committees and candidates*. 2 U.S.C. §§431(20)(A)(iii), 441i(b), (d), (e) & (f). And, as noted, in AO 2003-37, the Commission borrowed that phrase to impose "hard money" requirements on an organization that is *already* a federal political committee. The Commission has never applied that phrase to any other type of organization. And the Commission certainly did not do so in Advisory Opinion 2003-37.

For these reasons, neither The Media Fund nor MoveOn.org is a federal "political committee" within the meaning of the Act, 2 U.S.C. §431(4), or the Commission's regulations, 11 C.F.R. §100.5(a); contributions to The Media Fund and MoveOn.org Voter Fund are not subject to the limitations and prohibitions of the Act; and Mr. Bing's donations to those organizations are therefore entirely lawful.

ACT is a federal political committee with a non-federal account. Mr. Bing made contributions to the non-federal account which were, by definition, not subject to the limitations and prohibitions of the Act. The Commission's rules clearly permit federal political committees to maintain non-federal accounts. 11 C.F.R. §102.5(a). The Commission's allocation regulations provide such committees with guidance as to how to

allocate various categories of expenses between their federal and non-federal accounts. 11 C.F.R. § 106.6; see also, Advisory Opinion 2003-37. Mr. Bing has assumed that ACT allocates its expenses in accordance with these regulations, and he has not knowledge whatsoever of any instance in which ACT has not done so.

With respect to allegations of coordination, a careful review of the Complaint does not appear to implicate, in any way, the actual test for coordination under the Commission's rules at 11 C.F.R. § 109.21(d). Although the RNC attempts to weave an interesting and circumstantial tale about a grand conspiracy by progressive organizations, none of the facts alleged actually meet the standards set forth in the Commission's coordination regulations. Specifically, although the Complaint alleges that several former employers of party committees and candidates work for progressive organizations, the Complaint does not allege a single instance in which any of the persons transmitted any information to the progressive organization that was material to the creation of any communication paid for by the progressive organization. 11 C.F.R. § 109.21(d)(ii). Therefore, the Complaint fails to properly allege a violation of the law and should be dismissed by the Commission.

II. The Complaint Does Not State Any Violation of the Law by Mr. Bing

Even if the allegations of the Complaint were true, the Complaint does not state any violation of the law by Mr. Bing or any other donor. As noted, the Complaint alleges (falsely) that MoveOn.org and The Media Fund should be treated as federal political committees. And the Complaint alleges that The Media Fund's solicitation of contributions that do not meet the limitations and prohibitions of the Act, is in violation of the Act. (Complaint, pp. 3-4). The Complaint does not, however, allege any facts that could ever lead the Commission to find any violation of the law by Mr. Bing or any other donor.

It is undisputed that The Media Fund and MoveOn.org Voter Fund have not, in fact, registered as federal political committees. Even if either were required to do so—and they certainly are not so required, for the reasons stated above—it would be absurd to find that donors to such an organization could be held liable for making contributions not subject to the limitations and prohibitions of the Act.

The only reference to Mr. Bing in the Complaint, other than the fact that he is a contributor to these organizations is a reference to an organization called America Votes (to which Mr. Bing has not directly contributed), to which donors contribute because they "believe their policy goals will not be achieved without their donations to defeat President Bush..." (Complaint at p.37). Even if the Complaint accurately portrays a donor's intent for their contribution, a donor's subjective purpose or motivation is completely irrelevant to the lawfulness of his or her contribution.

In this case, donors have contributed funds, outside the Act's limitations and prohibitions, to organizations that, based upon the current law, have reasonably determined that they are not required to register as federal political committees and that did not in fact register as a federal political committee. Even if the Commission were to disagree with that conclusion, it would be absurd to find that donors should have made their own determination about the proper legal status of these organizations and could be found liable for having made their contributions accordingly. We are aware of no case in which the Commission has found that a donor, who had nothing to do with forming, organizing or maintaining an organization that did not register as a federal political committee, has been found liable for making contributions to the organization. And the Commission's actions regarding the status of 527 organizations in its meeting of May 13, 2004 serve to further confirm the legality of Mr. Bing's contributions and the activities of the organizations to which Mr. Bing has contributed.

For these reasons, the Commission should find no reason to believe that Mr. Bing has violated the Act or the Commission's regulations and should dismiss the Complaint as to Mr. Bing.

Further correspondence in this matter should be directed to the undersigned.

Sincerely yours,

Joseph E. Sandler
Neil P. Reiff

Attorneys for Respondent Stephen L. Bing